

Title 12.DEPARTMENT OF REVENUE
Division 10. Director of Revenue
Chapter 114. Sales/Use Tax. Constitutional Issues

Proposed Amendment

12 CSR 10-114.100 Determining When a Vendor Has [~~Sufficient~~]Substantial Nexus for Use Tax

Purpose: The Director proposes to amend this rule by modifying the title, purpose, section 1, section 2, section 3, and section 4 to clarify changes made in Senate Bill 23, 97th General Assembly.

PURPOSE: Chapter 144, RSMo contains the statutory provisions governing application of use tax. The legal responsibility for paying use tax may fall upon either the vendor or the purchaser. The vendor must register with the department, and collect and remit use tax if it has [~~sufficient~~]substantial nexus with the state. Unless the purchaser pays use tax to a vendor registered with the department to collect use tax, the purchaser must remit use tax to the state. This rule explains when a vendor must register with the department, and collect and remit use tax on sales to Missouri purchasers.

(1) In general, an out-of-state [~~vendor~~] seller must register with the department as a vendor, and collect and remit use tax when the [~~vendor~~] seller has [~~sufficient~~] substantial nexus with Missouri. [~~Sufficient~~]Substantial nexus exists when the [~~vendor~~]seller has a physical presence in Missouri.

(2) Definition of Terms.

[(A) Nexus – Contact with the state.]

[(B)]A Physical presence –

(1) [~~o~~]Owning or leasing real or tangible personal property within this state; or having employees, agents, representatives, independent contractors, brokers or others that reside in, or regularly and systematically enter into, this state on behalf of the vendor; or

(2) Engaging in business activities within the state.

[(C)]B Vendor – a seller who [makes sales of tangible personal property for use, storage or consumption in the state. A person is not considered a vendor if:

1. The person's total gross receipts did not exceed five hundred thousand dollars (\$500,000) in this state, or \$12,500,000 in the entire United States, in the immediately preceding calendar year;

2. The person maintains no place of business in this state; and

3. The person has no selling agents in this state.] has physical presence in Missouri.

(3) Basic Application[of Tax].

(A) A seller owning or leasing real or tangible personal property within this state; or having employees, agents, representatives, independent contractors, brokers or others that reside in, or regularly and systematically enter into, this state on behalf of the seller is a vendor in this state.

(B) A seller is presumed to engage in business activities and to be a vendor in this state if any person, other than a common carrier, that has substantial nexus with this state:

(1) Sells a similar line of products as the seller and does so under the same or a similar business name;

(2) Maintains an office, distribution facility, warehouse, or storage place, or similar place of business in the state to facilitate the delivery of property or services sold by the seller to the seller's customers;

(3) Delivers, installs, assembles, or performs maintenance services for the seller's customers within the state;

(4) Facilitates the seller's delivery of property to customers in the state by allowing the seller's customers to pick up property sold by the seller at an office, distribution facility, warehouse, storage place, or similar place of business maintained by the person in the state; or

(5) Conducts any other activities in the state that are significantly associated with the seller's ability to establish and maintain a market in the state for the sales.

(C) The seller may rebut the presumption in paragraph (B) by demonstrating that the seller's activities in the state are not significantly associated with the seller's ability to establish or maintain a market in this state for the seller's sales.

(D) A seller is also presumed to engage in business activities and to be a vendor in this state if the seller enters into an agreement with one or more residents of this state under which the resident, for a commission or other consideration, directly or indirectly refers potential customers, whether by a link on an internet website, an in-person oral presentation, telemarketing, or otherwise, to the seller, if the cumulative gross receipts from sales by the seller to customers in the state who are referred to the seller by all residents with this type of an agreement with the seller is in excess of ten thousand dollars during the preceding twelve months.

(E) The seller may rebut the presumption in paragraph (D) by submitting proof that the residents with whom the seller has an agreement did not engage in any activity within the state that was significantly associated with the seller's ability to establish or maintain the seller's market in the state during the preceding twelve months. Such proof may consist of sworn written statements from all of the residents with whom the seller has an agreement stating that they did not engage in any solicitation in the state on behalf of the seller during the preceding year provided that such statements were provided and obtained in good faith.

[(A) A vendor with sufficient nexus with Missouri must collect and remit use tax on sales, rentals or leases of tangible personal property purchased for use, storage or consumption in Missouri if the transaction is not subject to Missouri sales tax. The vendor has sufficient nexus when the vendor has a physical presence in the state.]

[(B)F] A [vendor]seller does not have [sufficient]substantial nexus if the only contact with the state is delivery of goods by common carrier or mail, advertising in the state through media, or occasionally attending trade shows at which no orders for goods are taken and no sales are made.

[(C) Occasional deliveries into the state by the vendor's seller's delivery vehicles with no other contacts do not constitute physical presence to establish sufficient substantial nexus.]

[(D)G] Once [sufficient]substantial nexus has been established, the [vendor]seller is liable for use tax on all sales of tangible personal property made in the state whether or not the sales activity related to the property or activity would be sufficient in and of itself to establish physical presence.

[(E)H] Once substantial nexus has been established, it will continue to exist for a reasonable period of time after the vendor no longer has a physical presence in the state. The department presumes that the vendor has nexus with the state for any sales to Missouri customers made during at least one (1) reporting period after the vendor no longer has physical presence in the state. A vendor registered with the department to collect tax will continue to have nexus until the vendor withdraws its registration.

[(F)I] The fact that a vendor has [sufficient]substantial nexus does not relieve the purchaser from liability for use tax. The liability for use tax is joint and several for the vendor and purchaser. The purchaser is relieved from the liability for the tax if the purchaser pays a separately stated Missouri tax to a vendor who is registered with the department to collect the tax.

[(G)J] A [taxpayer]seller must allow the department to review the [taxpayer's]seller's records even if the [taxpayer]seller believes that it does not have substantial nexus with the state.

(4) Examples.

(A) A taxpayer is located in Indiana. The taxpayer makes substantial sales into Missouri, which are delivered either by common carrier or U.S. mail. The taxpayer has no other contacts with the state. The taxpayer is not required to collect Missouri tax. Subsequently, the taxpayer acquires a warehouse in Missouri to store inventory for another part of its business. By acquiring the warehouse, the taxpayer has established a physical presence in the state and must collect tax on all sales to Missouri purchasers.

(B) An out-of-state company hires sales representatives to cover a five-state territory including Missouri. The sales representatives reside in Illinois but regularly travel to Missouri to solicit retail sales. The out-of-state company must collect tax on all sales to Missouri purchasers, regardless whether the sales representatives are employees or independent contractors.

(C) An out-of-state company that lacks [sufficient]substantial nexus voluntarily registers to collect use tax. The company should collect and remit the appropriate tax to Missouri.

(D) An out-of-state taxpayer leases machinery to various customers in Missouri. The taxpayer also sells tools and supplies over the Internet to customers in Missouri. The taxpayer must collect use tax on all of its sales and leases in Missouri because its leased property located in Missouri creates [sufficient]substantial nexus with the state.

(E) [Same facts as (4)(D) above,]An out-of-state taxpayer leases machinery to various customers in Missouri. The taxpayer also sells tools and supplies over the Internet to customers in Missouri. [except the]The taxpayer has received valid exemption certificates for the leases. The taxpayer must still collect use tax on its sales of tools and supplies.

(F) An out-of-state company accepts an order from a Missouri customer. The out-of-state company orders the merchandise from a wholesaler in Missouri for drop shipment directly to the customer. The out-of-state company must collect sales tax on the transaction because its ownership of the tangible personal property in the state creates [sufficient]substantial nexus.

(G) An out-of-state company with substantial nexus to Missouri accepts an order from a Missouri customer. The out-of-state company orders the merchandise from an out-of-state wholesaler for drop shipment directly to the customer. The out-of-state company must collect sales tax on the transaction.

(H) An out-of-state company without substantial nexus to Missouri accepts an order from a Missouri customer. The out-of-state company orders the merchandise from an out-of-state wholesaler for drop shipment directly to the customer. The out-of-state company has no obligation to collect tax on the transaction. The customer is required to accrue and pay use tax.

(I) An out-of-state company sells its products only through the Internet. The company enters into agreements with Internet sellers based in Missouri. The Internet sellers receive a commission on every sale made as a result of a referral from their websites. The out-of-state company must collect use tax on all of its sales shipped to a Missouri address.

(J) An out-of-state company sells its products only through the Internet. The company enters into agreements with Internet sellers based in Missouri. The Internet sellers receive a fixed fee for every referral to the out-of-state company's website. The Missouri sellers do not engage in solicitation in the state on behalf of the out-of-state company. The out-of-state company does not have substantial nexus and is not required to collect use tax on all of its sales shipped to a Missouri address.

*AUTHORITY: section 144.705, RSMo 2000.*Original rule filed Dec. 1, 2004, effective June 30, 2005.*

**Original authority: 144.705, RSMo 1959.*

PUBLIC COST: This proposed rule will cost state agencies or political subdivisions three hundred sixteen thousand, nine-hundred forty-six dollars (\$316,946) in the aggregate.

PRIVATE COST: This proposed rule will not cost private entities Nine hundred eighty-seven thousand, three hundred seventy dollars (\$987,370) in the aggregate.

*NOTICE TO SUBMIT COMMENTS: Anyone may file a statement in support of or in opposition to this proposed rule with the Missouri Department of Revenue, Legal Services Division, Governmental Affairs Bureau, PO Box 475, Jefferson City, MO 65105-0475. To be considered, comments must be received within thirty (30) days after publication of this notice in the **Missouri Register**. No public hearing is scheduled.*

***Quill Corp. v. North Dakota**, [112 S. Ct. 1904]504 U.S. 298 (1992). The U.S. Supreme Court reaffirmed the physical presence test for nexus. The out of state vendor whose only contact with the taxing state was by mail order did not have physical presence to establish [taxable]substantial nexus.*

*[**Burke & Sons Oil Co. v. Director of Revenue**, 757 S.W.2d 278 (Mo. App. 1988). Occasional deliveries into the state by the vendor's own vehicles with no other contacts with the state are not sufficient presence to create taxable nexus.]*

***ATD International v. Director of Revenue**, (AHC 1997). Taxpayer sold, installed and serviced telephone equipment. Taxpayer solicited business through advertising in Missouri. Its employees negotiated contracts at Missouri businesses and it installed and maintained equipment in Missouri. Taxpayer had sufficient physical presence in Missouri to have [taxable]substantial nexus.*

***Rembrandt Restaurant, Inc. v. Director of Revenue**, (AHC 1995). The fact that an out of state vendor has substantial nexus does not prohibit the director from holding the purchaser liable for use tax.*